1989

Robert E. Conger, vs. Tel Tech, Inc.: Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROBERT E. CONGER,	)	
	)	
Plaintiff/Appellant,	)	Case No. 890231-CA
	)	
vs.	)	Priority Classification 14b
	)	
TEL TECH, INC.,	)	
	)	
Defendant/Appellee.	)	
	)	

APPEAL
from judgment of the
Third Judicial District Court of Salt Lake County
State of Utah
Honorable Scott Daniels

BRIEF OF RESPONDENT

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LIST OF PARTIES TO THE LOWER COURT PROCEEDINGS

1. Robert E. Conger
2. Tel Tech, Inc.
3. Arthur J. Gallagher & Co.*
4. Western General Dairy, Inc.*
5. Scott Wetzel Company*

*Based upon Appellant Robert E. Conger's representation, Appellant has resolved his disputes with all parties to the lower court proceedings, with the exception of Tel Tech, Inc. Therefore, Arthur J. Gallagher & Co., Western General Dairy, Inc., and Scott Wetzel Company are not parties to this Appeal. See Appellant's Brief, p. i; see also R. 620-621A.

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STATEMENT OF JURISDICTION AND PROCEEDINGS BELOW

This appeal is brought pursuant to the provisions of Article VIII, Sections 3 and 5 of the Constitution of Utah, Rules 3, 4 and 4A of the Rules of the Supreme Court and Rule 4A of the Rules of the Utah Court of Appeals. Mr. Conger appeals from the Third Judicial District Court's Entry of Judgment in favor of Tel Tech, Inc., on February 8, 1989, on a jury verdict. (See R. 884-886, 895-896, 910-911.)

ISSUES PRESENTED FOR REVIEW

1. Did the trial court correctly rule that Tel Tech did not supply a defective and unreasonably dangerous product which had caused injury, and that one who provides installation services of a non-defective product is not subject to a claim of strict liability, but is subject only to a negligence claim?

2. Was the trial court's jury admonition to disregard only testimony relating to unreasonably dangerous product sufficient to avoid prejudice to plaintiff's negligence claim?

3. If the case is remanded for another trial on negligence, may defendant now assert plaintiff's comparative negligence as an affirmative defense?

STATEMENT OF THE CASE

A. Nature Of The Case

On January 1, 1981, Appellant Robert E. Conger fell from the top of a stainless steel milk tanker on which he was walking. On September 13, 1982, Mr. Conger filed an action seeking damages for personal injuries sustained in the fall against Tel Tech, Inc., and others. The action against Tel Tech alleged that Tel Tech was negligent in its modification of the tanker, which included installation of cleaning equipment inside the tanker, because Tel Tech had failed to install walk protection on the top of the tanker and to warn of the necessity of such walk protection. Near the end of trial, Mr. Conger amended his Complaint also to allege a theory of strict products liability.

B. Course of Proceedings and Disposition Below

On April 18, 1984, Mr. Conger filed a Second Amended Complaint. On July 23, 1984, Tel Tech filed a Motion for Summary Judgment on the grounds that Tel Tech owed no duty to warn Meadow Gold, that any duty was discharged by Meadow Gold's knowledge of the hazard, and that Tel Tech did not owe Mr. Conger any duty to judge the adequacy of Meadow Gold's direction with respect to the installation of cleaning equipment. (R. 185-86, 189-200.) On

September 20, 1984, the trial court filed a Memorandum Decision granting Tel Tech's Motion for Summary Judgment. (R. 349-353.) On November 6, 1984, Mr. Conger filed a Motion to Amend and/or for Relief From Judgment Granting Defendant's Motion for Summary Judgment, which the trial court denied. (R. 371-372, 385-386.) Mr. Conger voluntarily dismissed his claims against Western General Dairy, Inc., and settled with Arthur J. Gallagher & Co. and Scott Wetzel Company. (Appellant's Brief, p. i.) The trial court ordered those claims dismissed on January 12, 1987, and Mr. Conger filed a Notice of Appeal on February 4, 1987, with respect to the trial court's Order of Summary Judgment for Tel Tech. (R. 622-626.) After the matter was briefed and argued, on May 13, 1988, this Court issued a Memorandum Decision in which it stated:

> [C]ontractual relationships for the performance of services impose on each of the contracting parties a general duty of due care toward the other, apart from the specific obligations expressed in the contract itself. The care to be exercised in any particular case depends upon the circumstances of that case and on the extent of foreseeable danger involved and must be determined as a question of fact.

(R. 647-649 (quoting DCR Inc., v. Peak Alarm Co., 663 P.2d 433, 435 (Utah 1983)) (emphasis supplied).) Stating that under its contract with Meadow Gold for the performance of services Tel Tech owed Mr. Conger a duty of reasonable care, this Court reversed the trial court and remanded the case for trial. The question for the jury was whether reasonable care required Tel

Tech to do more than it agreed to do and had been asked to do under its service contract. (R. 647-649.)

The case was tried to a jury beginning January 23, 1989, and concluding January 26, 1989. (R. 922-927.) On January 25, 1989, the third day of trial, plaintiff's milk tanker expert, Mr. Eilers, testified. Mr. Conger's attorney propounded questions to Mr. Eilers which sought to establish elements of a strict liability theory. Tel Tech strenuously objected to the questioning on grounds of surprise and that throughout the lawsuit, the plaintiff had pleaded only negligence. The trial court overruled the objection, and allowed the plaintiff to amend the Complaint and elicit responses from his expert in an effort to satisfy the elements of a strict liability theory. (R. 922, pp. 28-38.)

At the close of evidence, the trial court entertained Tel Tech's Motion for Directed Verdict on plaintiff's claim of strict liability. The Motion was based on the following undisputed facts: Tel Tech offered the specialized service of heliarc welding necessary for the installation of stainless steel components and parts; Meadow Gold, in need of such service, hired Tel Tech to supply parts and labor for the customized installation of two spray ball cleaners in the skin of Meadow Gold's tanker trailer; the spray balls themselves worked perfectly and normally and did not cause injury; as part of the

service contract, Tel Tech was not asked to install and had not installed walk protection; regardless of how plaintiff attempted now to couch the claim, the overwhelming, undisputed evidence was that the manner of the service performed, rather than any "product," was the alleged cause of plaintiff's injuries, see Footnotes 2 and 3, infra; the overwhelming case law precluded the application of a theory of strict liability where (1) the parts that were supplied with the installation service were not themselves defective, and (2) the plaintiff's injury allegedly arose out of a legal deficiency in the service itself. (R. 927, pp. 3-28.)

After hearing argument on the Motion and reviewing the cited authorities, the trial court ruled that the evidence was undisputed, that the spray balls themselves were not defective and had not caused injury, but rather the gravamen of the claim was with Tel Tech's installation service. Where Tel Tech had not supplied a defective product that had caused injury, but had allegedly performed an installation contract in a negligent manner, the court would allow submission of the case to the jury based on negligence, but not on strict liability. (R. 927, pp. 16-28.)

The trial court then informed the jury that the case would be submitted to them for decision on negligence, a fault theory, and that they should disregard only that part of Mr. Eilers'

testimony that focused solely on the product liability theory. (R. 926, p. 11-12.)

The case was submitted to the jury on Mr. Conger's negligence claim, and the jury returned a verdict of no cause of action. (R. 890-892.) The trial court entered judgment on the jury verdict on February 8, 1989. (R. 884-886, 895-896, 910-911.)

C. Statement of Facts

1. On January 1, 1981, while employed by Beatrice Foods Company, Meadow Gold Division ("Meadow Gold"), appellant Robert E. Conger ("Mr. Conger") was attempting to clean the interior compartments of a stainless steel milk tank trailer. The trailer had in the top two interior cleaning devices, known as spray balls. (R. 925, pp. 168-169, 173-174, 178-181.)

2. A spray ball consists of a piece of stainless steel tubing inserted through the skin and shell, into the tanker itself and welded into place. It is sealed off by a hex nut ferrule when not in use. The station is used as a port through which a chemical solution and rinsing water are pumped into the tank in connection with the cleaning of the tanker's inside. It derives its name from the actual device through which the solution and water flow. A small spray ball is attached to a tube, which is connected to the hose accessing the chemical solution and water. As the liquids are pumped through the ball, it sprays them systematically throughout the entire inside of the

tanker compartment. (R. 633, pp. 9, 24; 924, pp. 55-57; 925, p. 130.)

3. The top of the tanker trailer also had two hatches that accessed the respective compartments, the openings of which extended above the top of the trailer surface. (R. 925, pp. 157-158, 160.)

4. While walking along the top of the tanker trailer and holding onto the end of a hose to hook up to the rear spray ball, Mr. Conger stepped over the rear hatch, placed his foot into spilled grease or milk fat he had failed to clean, slipped and fell off the top of the trailer, and sustained serious personal injuries. (R. 925, pp. 114-116, 177-181, 201, 205-206, 233.)

5. Meadow Gold, Mr. Conger's employer, had purchased the milk tanker in March of 1979; two months later, in May of 1979, Meadow Gold entered an oral contract with Tel Tech to provide parts and labor for the customized installation of the two spray balls into the tanker trailer. (R. 924, pp. 19, 21, 22, 33-35, 38.)

6. Tel Tech was in the business of selling chemicals, stainless steel parts and certain specialized services to the dairy industry. Tel Tech provided the specialized service of heliarc welding necessary for the technical and sanitary requirements for stainless steel welding in dairy equipment. Stainless steel welding differs significantly from other types of

welding, especially with thin gauges of stainless steel such as those involved in the installation of spray ball cleaning devices in the skin of a milk tanker. (R. 924, pp. 24, 27-29, 49, 55-57, 60-62; 925, p. 133; 922, pp. 70, 88-91, 113-114.)

7. Tel Tech had been hired on numerous prior occasions to perform stainless steel installation or welding services at Meadow Gold's plants, and Meadow Gold frequently supplied the fittings and tubing it wanted installed. (R. 924, pp. 24, 29; 922, pp. 99-101, 113-114, 120.)

8. The milk tanker at issue required two spray balls, one for each tanker compartment; without them, the interior of the trailer could only be cleaned manually by a Meadow Gold employee who was required to enter the compartments and brush on chemical solution and rinsing water. (R. 925, pp. 155-156, 171.)

9. After the spray ball stations were welded into the skin of the tanker, the operator or other employee responsible for cleaning the tanker was only required to remove the hex nut ferrule and connect the tube to a hose through which cleaning and rinsing solution would be pumped. (R. 925, pp. 168-169, 173-174.)

10. Donald Dvorak, a local transportation manager for Meadow Gold, contacted Tel Tech and reached an oral agreement with Tel Tech to provide parts and labor to install two spray balls in the top of the tanker trailer. Mr. Dvorak never discussed with Tel Tech anything other than the installation of

the spray balls. Mr. Dvorak never instructed Tel Tech to install walk protection along the top of the tanker trailer in the area of the individual spray balls and no facts indicate that Meadow Gold wanted walk protection. On May 7, 1979, Tel Tech installed the two spray balls and billed Meadow Gold $170.00 plus tax for the parts and labor. (R. 924, pp. 22-23, 31, 33-38, 46; 922, pp. 78-79.)

11. At the time Tel Tech welded the spray balls into the tanker, Meadow Gold had an arrangement with Western General Dairy for the use of Western General Dairy's facility to clean its tankers. The Western General facility had a portable, swinging walkway mounted above the tanker cleaning bay so that it could be lowered directly onto the crown near the spray ball stations and would not necessitate an employee to walk along the top of the trailer to access the spray balls. The two spray balls were installed at the Western General facility, and Tel Tech was unaware of where the trailer would be cleaned. (R. 925, pp. 54, 165-168; 924, p. 21; 922, pp. 94-95, 115.)

12. Tel Tech faithfully performed the service Meadow Gold had requested. No evidence exists in the record of Meadow Gold ever complaining that Tel Tech's work was deficient or that the spray balls did not adequately perform their intended function--the cleaning and rinsing of the inside of the tanker. Meadow

Gold accepted Tel Tech's services and paid the $178.50 statement in full. (R. 922, pp. 92-93.)

13. Tel Tech's specialty was narrowly focused. Tel Tech was not in the business of designing, manufacturing or selling milk tankers or safety features on milk tankers. Tel Tech never held itself out as having knowledge or experience with respect to safety features on milk tankers. Tel Tech was never asked to install such safety features and was never consulted or asked to consult with respect to such safety features. (R. 633, pp. 20-26; 636, pp. 11-12, 21-23; 638, pp. 36-37; 924, p. 64; 925, pp. 139, 142.)

14. Mr. Conger had driven that particular truck and tanker approximately 500 times prior to the accident. He had driven the tanker some fifteen to sixteen months after the spray balls were installed until his accident. As part of his duties in driving the tanker, he was required to clean the compartment interiors after he was finished delivering each load. It was also his responsibility to clean the exterior of the trailer, as needed. (R. 925, pp. 162, 168-169, 154, 171-174, 201; 924, pp. 26, 41-43.)

15. To clean the interior compartments, Mr. Conger would climb a ladder to the top of the trailer, walk along the top to the spray ball stations and connect the hose to the spray balls. (R. 925, pp. 168-169, 171-174.)

16. Mr. Conger did the cleaning in this manner 300-400 times before his accident. Prior to the accident, he was clearly aware of the danger associated with walking along the top of the stainless steel trailer, had spoken with other employees about the danger, and had asked his employer to remedy the danger by putting up some form of walk protection. His employer did nothing.[1] (R. 925, pp. 172, 176, 217, 219, 228.)

17. On September 13, 1982, Mr. Conger sued Tel Tech. In his Second Amended Complaint, filed April 18, 1984, he alleged that Tel Tech "made certain modifications to said tanker, which include the installation of clean-out valves on the top of the tank," and that Tel Tech "negligently failed to install walk protection to the clean-out valves and negligently failed to warn and advise of the necessity of such walk protection." (R. 156.)

18. As set forth above, see B. Course of Proceedings and Disposition Below, supra., on appeal from the prior summary disposition, the case once before was in this Court on the question of whether one who performs a service contract has a

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[1] With the benefit of hindsight, Meadow Gold has stated, had Tel Tech installed some form of walk protection, it certainly would have paid for it. However, Meadow Gold's statement may be disingenuous because Mr. Conger was unable to get Meadow Gold to provide some form of walk protection and Meadow Gold's local transportation manager, Donald Dvorak, had given some thought to putting up walk protection along the top of the trailer but never did anything about it. (R. 924, p. 47.)

duty to exercise reasonable care beyond the contract requirements, and the case was remanded for trial. (R. 647-649.)

19. At trial, Mr. Conger's milk tanker expert, Mr. Eilers, testified extensively regarding his experience in the dairy and tanker trailer industry, various types of cleaning equipment for dairy trailers, various installations of cleaning equipment, various safety equipment and apparatus and his opinion regarding standards in the industry for an installer of cleaning equipment. He gave his opinion that where access to a cleaning system required walking along the top of a tanker trailer, the minimum standard of care required the installation of some kind of walk protection. He testified that in his opinion, Tel Tech had failed to meet the minimum standard of care required of an installer of cleaning equipment. (R. 922, pp. 10-27, 40.)

20. Mr. Eilers also testified on cross examination regarding the conduct of Mr. Conger, the he would not have done what Mr. Conger did, and that he would have recognized the grease Mr. Conger stepped in as a hazard. He testified that the manner in which Mr. Conger cleaned the hatches made it more likely to create a slippery or hazardous condition on the tanker. He testified that safety was everyone's concern, including Mr. Conger's. (R. 922, pp. 67-69.)

21. Mr. Eilers testified that one who provides installation services of cleaning equipment in a tanker trailer is not a

manufacturer, as did Dr. Thomas Blotter, Tel Tech's engineer. (R. 922, pp. 18, 156.)

22. Over Tel Tech's objection, Mr. Eilers then testified that in his opinion, Tel Tech had created a hazardous condition, and that the "manner" of installation of the spray balls was defective and unreasonably dangerous for lack of walk protection. (R. 922, pp. 34-38.)

23. At the close of evidence, the trial court granted Tel Tech's Motion for Directed Verdict on the strict liability claim, on the grounds that the theory of strict liability does not apply to a contract for installation services, the product itself was not defective and had not caused injury, and plaintiff's claim went to the manner of installation rather than any product defect.[2] (R. 927, pp. 3-28.)

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[2] Not only was the evidence at trial undisputed that the spray balls were not, of themselves, defective, that no "product" had caused injury, and that plaintiff's allegations went to the adequacy of the installation service, but all of plaintiff's pretrial allegations and arguments, including arguments to this Court, were based solely on the adequacy of Tel Tech's performance of its service contract with Meadow Gold--the customized installation of the spray balls. Up to the time of trial, the plaintiff had contended, successfully to this Court, that Tel Tech was the provider of a specialized service and had a duty to exercise reasonable care in the performance of its service. The following examples of plaintiff's argument are taken from Appellant's prior Briefs to this Court:

> Meadow Gold had requested Tel Tech to install the spray balls on the tanker because it understood and relied upon Tel Tech to have <u>expertise in the installation and servicing of dairy equipment</u> and in working with stainless steel tankers.

(Prior Brief of Appellant, p. 4 (emphasis supplied).)

> As pointed out in Appellant's opening brief and again in detail in Tel Tech's brief at pp. 6 and 7, Tel Tech and Meadow Gold agreed, in other words contracted, for Tel Tech to provide a service to Meadow Gold, namely, the installation of the spray balls in the tanker. Pursuant to the contract, Tel Tech performed the service and received consideration therefor.

(Prior Reply Brief of Appellant, p. 4 (emphasis supplied).)

Citing Restatement (Second) of Torts § 323 (1965), Negligent Performance of Undertaking to Render Services, Mr. Conger then argued that:

> The Utah Supreme Court has long recognized and approved the generally accepted tort doctrine that "contractual relationships for the performance of services impose on each of the contracting parties a general duty of due care toward the other, apart from the specific obligations of the contract itself."

(Prior Reply Brief of Appellant, p. 4 (emphasis supplied) (citation omitted).)

Mr. Conger then argued:

> Thus, based upon the undisputed fact that Tel Tech contracted to perform and did perform a service for Meadow Gold, Tel Tech owed a general duty to exercise due care to Meadow Gold with respect to Tel Tech's agreement to install the spray balls.

(Prior Reply Brief of Appellant, p. 8 (emphasis supplied).)

> A careful reading of DCR[Inc. v. Peak Alarm Co.] compels the rejection of Tel Tech's attempted distinctions as well as the faulty analysis of the trial court in its Memorandum Opinion, since a contractual relationship for the performance of services existed between the relevant parties in both DCR and this case.

(Prior Reply Brief of Appellant, p. 8 (emphasis supplied).)

> Moreover, contrary to cases such as Ragsdale [v. K-Mart Corp. 468 N.E.2d 524 (Ind. App. 1984)] and Stodghill [v.

24. The trial court then explained to the jury:

> Before I instruct you, I need to apprise you of one legal matter that has been taken care of. Originally, the plaintiff was making a claim against the defendant on two different legal theories; one was a fault theory and one was--what's called a product liability theory, which is a theory of law upon which people can recover from defective products that cause injuries regardless of fault.
>
> I dismissed the second claim for legal reasons which the Court doesn't need to concern you with. And you will be asked to determine this case based on the negligence or fault theory. But some of the evidence that came into trial related solely to the--the product theory, evidence that the product that was sold was defective and unreasonably safe. You'll hear some of the discussions between the lawyers, whether that evidence should be admitted, because that legal theory is no longer part of the case. That evidence is not relevant and will be stricken from the record, and you should treat it as if you've never known it.

(R. 926, p. 11.)

> Frat-Allis Constr. Mach., Inc., 163 Ga. App. 811, 295 S.E.2d 183 (1982)], Tel Tech's negligent conduct here arose not in the context of a distant manufacturer or supplier of a new product having no contract with the plaintiff or no opportunity to know of the use to which the product would be put; Tel Tech's negligence occurred in connection with a contract with Meadow Gold to modify a specific tanker to be used by Meadow Gold in a particular manner . . . .

(Prior Reply Brief of Appellant, p. 12 (emphasis supplied).)

The trial court's ruling is consistent with appellant's prior arguments to this Court--that the product itself was not the problem, but rather Tel Tech's alleged negligent service pursuant to its installation contract with Meadow Gold was the problem (see R. 647-649)--and with this Court's Memorandum Decision, dated May 13, 1988. (See R. 647-649.)

25. The court then instructed the jury on plaintiff's negligence claim, defined "negligence" and "ordinary care," and explained that:

> Tel Tech[] owed a duty of reasonable care to the plaintiff to install the spray balls in a reasonably safe manner, and to avoid creating a hazardous or dangerous condition. If you find that defendant, Tel Tech, failed to exercise reasonable care as a proximate result of which plaintiff was injured, you must then determine whether the plaintiff failed to exercise reasonable care for his own safety in a manner which proximately caused his injuries.

(R. 926, pp. 18-20; see also R. 847-883.)

26. After the jury was instructed, Mr. Conger's attorney argued the case relying heavily upon Mr. Eilers' testimony regarding standards in the industry, minimum standard of care, and the alleged deficiency of Tel Tech's conduct in its installation of the cleaning equipment. (R. 926, pp. 40-41.)

27. The jury found that Tel Tech had not failed to exercise reasonable care. (R. 890-892.)

SUMMARY OF ARGUMENTS

Pursuant to a service contract, Tel Tech provided parts and labor for the customized service of heliarc welding two spray balls into the skin of Meadow Gold's trailer. No parts it supplied were defective or caused injury. Plaintiff's claim of injury goes to the manner of installation into a preexisting product not supplied by Tel Tech, rather than any cognizable "product" defect. Alleged deficient installation services,

absent a defect in the product installed, are not subject to the strict liability doctrine.

Legal and policy issues which underlie strict liability doctrine show the inapplicability of that doctrine to this case. Strict liability is not appropriate where one provides customized skill and services not subject to the standard quality control processes of the factory. One who hires an expert for services, under the law, is entitled to only reasonable care and competence. The problem of consumer difficulty to trace, pinpoint and prove remote fault up the distribution chain to distant mass producers of goods does not apply where services were not part of a marketing chain and where the transaction emanated from a face-to-face relationship. The risk distribution justification for strict liability does not apply in the service context because of the inherent problems service providers have in spreading losses as compared to manufacturers of goods.

The trial court's jury admonition to disregard testimony going only to the strict liability claim accurately and fairly stated the law and avoided the confusion, misunderstanding and prejudice that otherwise would have occurred.

If the case is remanded for another trial on grounds of prejudice, Tel Tech may assert Mr. Conger's comparative negligence as an affirmative defense because any jury confusion

would apply equally to Tel Tech's defense and the jury's finding of no negligence on Mr. Conger is unreliable.

ARGUMENT

THE JUDGMENT OF THE TRIAL COURT SHOULD BE AFFIRMED.

POINT I

THE TRIAL COURT CORRECTLY RULED THAT TEL TECH DID NOT SUPPLY A DEFECTIVE AND UNREASONABLY DANGEROUS PRODUCT WHICH HAD CAUSED INJURY, AND THAT ONE WHO PROVIDES CUSTOMIZED INSTALLATION SERVICES OF A NON-DEFECTIVE PRODUCT IS NOT SUBJECT TO A CLAIM OF STRICT LIABILITY.

Plaintiff's appeal presents the legal question of the conceptual reach of the strict liability theory into the area of service contracts or the provision of services.

A. The Undisputed And Admitted Facts Show That The Gravamen Of Plaintiff's Claim Goes To A Service And Not A Product.

Inconsistent with his original pleading, negligence theory, prior arguments to this Court[3] and prior ruling of this Court,

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[3] In addition to Mr. Conger's prior arguments to this Court set forth in Footnote 2, appellant cited Restatement (Second) of Torts § 323 (1965), Negligent Performance of Undertaking to Render Services, to show a duty of reasonable care. Section 323 states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Mr. Conger attempts to characterize Tel Tech's offending conduct no longer as the negligent provision of services, but now as the supply of a defective product--a "cleaning system," incorporated into Meadow Gold's tanker trailer. Although alternative pleading is a common practice, plaintiff's new-found claim of strict liability presents a problem of mutual exclusivity with his prior claim and this Court's prior ruling because alleged deficient services are not subject to a claim of strict liability. See Point I, B., infra. Despite his efforts now to classify the terms of the service contract as a product for purposes of Section 402A strict liability, plaintiff claims injury due to the manner of installation. This Court already has recognized that Tel Tech was in the position of a contractor for the provision of custom services, as has Mr. Conger, see Footnotes 2 and 3, and the trial court properly recognized that it was the customized

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(Emphasis supplied.) Citing DCR Inc. v. Peak Alarm Co., 663 P.2d 433 (Utah 1983), Williams v. Melby, 699 P.2d 723 (Utah 1985) and Crandall v. Ed Gardner Plumbing & Heating, 17 Utah 2d 138, 405 P.2d 611 (1965), Mr. Conger argued that:

> The general duty between contracting parties is not limited only to service contracts which are ongoing until an injury occurs, but includes contracts such as here, where work is performed, the service has been completed, and the injury occurs some time thereafter.

(Prior Reply Brief of Appellant, pp. 4-5 (emphasis supplied).)

manner of installation--that presented the only factual scenario for possible relief.[4]

First, the only parts or "product" Tel Tech supplied were the spray balls themselves. The devices worked properly, were not defective and did not cause injury.[5] Tel Tech did not manufacture, sell, distribute or supply the tanker trailer with its curved, stainless steel skin, the hose or the Meadow Gold facility where Mr. Conger ultimately cleaned the tanker.

Second, because of its specialized skill and expertise of heliarc welding, Meadow Gold hired Tel Tech to perform a customized service contract which Tel Tech did according to the

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[4] The standard of review of a directed verdict is the same as that imposed upon the trial court: Whether, viewing the evidence in a light most favorable to the plaintiff, "reasonable minds would not differ on the facts to be determined from the evidence presented." Management Committee of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 897-98 (Utah 1982); Curtis v. Harmon Electronics, Inc., 575 P.2d 1044, 1046-47 (Utah 1978). However, it is the trial court's prerogative to determine what law applies to the facts presented. The trial court would commit error by instructing on a legal theory, such as strict liability, where the facts did not present a cognizable claim under that theory. See, e.g., Gray v. Scott, 565 P.2d 76 (Utah 1977).

[5] Viewing the undisputed evidence in a light most favorable to plaintiff, reasonable minds could not differ that the product Tel Tech did supply did not satisfy the elements of a strict liability claim. It supplied only the spray balls and installed them at Meadow Gold's behest. The spray balls worked perfectly. It did not provide any other product or component, including the tanker trailer, the connecting hose, or the Meadow Gold facility where the trailer was cleaned. With respect to the product Tel Tech did supply, the strict liability claim failed as a matter of law. See Footnote 4.

contract's specific terms. Had Tel Tech simply sold the spray ball parts to Meadow gold without installing them, they would have been useless to Meadow Gold without the specialized skill of heliarc welding and their installation into the trailer.

Third, the safety engineering aspects of the installation contract that Tel Tech allegedly overlooked related to the location and placement of the spray balls rather than their function or operation--clearly, an alleged problem with the manner of installation.

Fourth, plaintiff successfully persuaded this Court that Tel Tech had performed a service contract and that one who performs a service contract is held to a reasonable person standard, which presented a fact question on whether Tel Tech should have installed walk protection. See Footnotes 2 and 3 and R. 647-649.

Restatement (Second) of Torts § 402A (1965) requires the sale of a defective product unreasonably dangerous to the ordinary user or consumer. Many courts have addressed the question of what qualifies as a "product" for Section 402A strict liability purposes. In a hybrid sale-service transaction, Section 402A liability is limited to defects in the product supplied and does not include the non-negligent mistakes in service. For example, in Davis v. Pacific Diesel Power, Co. 41 Or. App. 597, 598 P.2d 1228 (1979), the defendant sold rebuilt engines for compressors and, pursuant

to a contract with plaintiff's employer, installed the rebuilt engines in the compressors. The compressors were used to provide oxygen for breathing apparatus. As a result of a fire, lubricating oil inside the compressor ignited, releasing carbon monoxide into the workers' supply of breathing air. Plaintiffs alleged that the engines were defective and unreasonably dangerous because of claimed defects in the automatic shut-down system of the compressor. Affirming the trial court's order striking plaintiffs' counts in strict liability, the appellate court found that the problem was not with the product defendant had sold to plaintiffs' employer. Rather, the defendant had failed to install a functional shut-off system for the compressor. The court agreed with the trial court that plaintiff's real contention was not with the product supplied, but with the method or manner or installation; as a matter of law, plaintiff had failed to establish the sale of a defective product. Plaintiff's claim was properly submitted to the jury on only the negligence claim. 598 P.2d at 1230, 1232-33.

In the leading case of Hoover v. Montgomery Ward & Co., 270 Or. 498, 528 P.2d 76 (1974), the court held that the negligent installation of a non-defective product does not fall within the definition of a "dangerously defective product" for strict liability purposes. Defendant had mounted a non-defective tire on plaintiff's car and allegedly had failed to tighten the lug

nuts and to inspect the wheel assembly, causing injury. Plaintiff alleged and argued that the "product" defendant had sold was not merely the (non-defective) tire, but the inadequate installation of the tire on the car, making the car unreasonably dangerous for its intended use. Rejecting plaintiff's conceptual extension of "dangerously defective product," the court recognized the claim for what is was: "Plaintiff contends that the defendant should be held strictly liable in tort for the negligent installation of the wheel onto the axle." Id. at 77. The court refused to accept plaintiff's contention that defendant had sold what plaintiff herein might characterize as a "wheel system."

Affirming the trial court's refusal to submit to the jury the question of strict liability, the court made several pertinent observations:

> "When the contract between plaintiff and defendant is commercial in character, the courts are willing to extend liability without fault to the hybrid sale-service transaction, provided that a defective product is supplied to the plaintiff or used by the defendant in the course of performing the service. . . ."
>
> In cases other than the sale-service hybrid transaction courts have also been reluctant to extend the definition of "product" beyond the article actually manufactured or supplied. . . .
>
> In the instant case it is obvious that the product sold to plaintiff was not dangerously defective. Even if we accepted plaintiff's version of the cause of the accident, it was not a dangerously defective tire which caused plaintiff's injuries, but rather the installation of the wheel on the hub and axle of the auto. In such case it

> might be said that plaintiff's auto became dangerously defective, but certainly not the tire. . . .
>
> It is clear that this was not a proper case for strict liability in tort and the trial court correctly refused to submit that issue to the jury.

Id. at 77-78 (citations omitted, emphasis supplied).

Mr. Conger's reliance on another leading case, Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969), is curious because of its direct application to defendant's position. In Gimbel's, defendant sold a permanent wave solution which burned plaintiff's scalp and forehead. Because a beauty parlor had sold and applied the solution, the court recognized that the transaction involved incidents of a sale and a service. In allowing the claim of strict liability to attach to the sale, the court recognized that, had the defendant simply sold the solution and plaintiff had applied it herself, she still would have been burned because of the inherent defects in the wave solution itself. 258 A.2d at 700-03. Many courts have commented on the meaning and reach of Gimbel's. For example, in Lemley v. J & B Tire Co., 426 F. Supp. 1378 (W.D. Pa. 1977), the court stated:

> "There the plaintiff had been injured when an allegedly defective permanent wave solution was applied to her hair by the defendant beauty parlor. The Court, in holding the beauty parlor strictly liable for defects in the permanent wave solution, was careful to note the sales aspects of what it saw as a 'sales-service hybrid transaction.' It will be noted that the Court there did not hold that the beauty parlor operator would be strictly liable for nonnegligent mistakes in its own application of the solution, but only for defects in the solution itself."

Id. at 1379 (quoting Raritan Trucking Corp. v. Aero Commander, Inc., 458 F.2d 1106, 1115 (3rd Cir. 1972) (emphasis supplied)).

The Hoover court also commented on Gimbel's, as follows:

> [T]he New Jersey Supreme Court held a beauty shop strictly liable under an implied warranty of fitness when defective permanent wave lotion was applied to a patron's hair. The court reasoned that if the lotion had been sold over the counter there would have been strict liability. There was no logical reason to hold otherwise merely because the defective lotion was applied in a service context . . . .
>
> In [Gimbel's], as in all sale-service hybrid cases, it is clear that the product, as opposed to the service, was defective. . . . In the case at hand, . . . there was no allegation that the tire was defective.

Hoover, 528 P.2d at 77.

See also Lemley v. J & B Tire Co., 426 F.2d 1378, 1379-80 (W.D. Pa. 1977) (one who supplies parts and service for brake repair is not subject to claim of strict liability; no evidence exists to suggest any defects in the components supplied by defendant in the repair of the brakes); Swenson Trucking & Excavating Inc., v. Truckweld Equip. Co., 604 P.2d 1113, 1115-17 (Alaska 1980) (alleged defective weld in ram assembly did not subject defendant to claim of strict liability; for strict liability to apply, "merchant would . . . have to do something more than sell an attachment for the vehicle, agree to put it on, and agree to repair the part of the vehicle that eventually breaks"); Nastasi v. Hochman, 58 A.D. 2d 564, 396 N.Y.S.2d 216, 217-18 (1977) (where in-flight fire causing airplane crash was caused by faulty installation of strobe light system, rather than

component parts to the system, manner of installation was the cause and strict liability claim did not attach); Cropper v. Rego Distribution Center, Inc., 542 F. Supp. 1142, 1148-49 (D. Del. 1982) (defendant designed and built facility and incorporated components that were not defective of themselves but put in system that allegedly created a dangerous situation; professional services of designer and builder of riser system facility which caused injury and death were not subject to claim of strict liability); Wenrick v. Schloemann-Siemag Aktiengesellschaft, 361 Pa. Super. 137, 522 A.2d 52, 56-57 (1987) (cited by Mr. Conger) (non-defective component part supplier does not have a duty to anticipate dangers that might be associated with integration of its parts into completed product).

If Tel Tech had sold spray ball parts to Meadow Gold and the parts themselves had been inherently defective and caused injury, plaintiff's claim of strict liability might have merit under the Gimbel's analysis. However, it was Tel Tech's narrow, specialized skill that made the contract valuable to Meadow Gold. The parts themselves, installed or uninstalled, were not defective and did not cause injury. The manner of installation allegedly did. Plaintiff's own expert testified that the "manner" of installation was what made the spray balls defective and unreasonably dangerous. He also testified that Tel Tech's service contract did not qualify Tel Tech as a manufacturer.

Regardless of plaintiff's belated attempt to construe the facts into a cognizable strict liability case, the undisputed facts and those admitted by Mr. Conger, see Footnotes 2 and 3, as a matter of law preclude that construction.[6]

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[6] Most of the cases Mr. Congers cites in his Brief are vastly distinguishable from this case, usually on several grounds. Those cases were not situations where an independent contractor, because of its specialized skill, was hired to perform a customized service of installing a non-defective product into a pre-existing product. In those cases, either the product itself caused injury, similar to the Gimbel's analysis, and/or the original design of the entire system and all parts were included as part of a finished, uncustomized, marketed product. See, e.g., Anderson v. Dreis & Krump Mfg. Corp., 48 Wash. App 432, 739 P.2d 1177 (1987) (original design problem of entire system); Nettles v. Electrolux Motor AB, 784 F.2d 1574 (11th Cir. 1986) (original design problem of entire system); Siebern v. Missouri-Illinois Tractor & Equip. Co., 711 S.W.2d 935 (Mo. App. 1986) (original design problem of entire system); Gann v. International Harvester Co., 712 S.W.2d 100 (Tenn. 1986) (original design problem of entire system); Lanclos v. Rockwell Intern. Corp., 470 So. 2d 924 (La. App. 1985) (original design problem of entire system); Eldridge v. Firestone Tire & Rubber Co., 24 Ohio App. 3d 94, 493 N.E.2d 293 (1985) (original design problem of entire system); Jones v. Pak-Mor Mfg. Co., 700 P.2d 830 (Ariz. 1984) (original design problem of entire system); Arthur v. Avon Inflatables, Ltd., 156 Cal. App. 3d 401, 203 Cal. Rptr. 1 (1984) (original design problem of entire system); Jarrell v. Fort Worth Steel & Mfg. Co., 666 S.W.2d 828 (Mo. App. 1984) (original design problem of entire system); Caterpillar Tractor Co. v. Boyett, 674 S.W.2d 782 (Tex. App. 1984) (original design problem of entire system); Carter v. Massey Ferguson, Inc., 716 F.2d 344 (5th Cir. 1983) (original design problem of entire system); Beacham v. Lee-Norse, 714 F.2d 1010 (10th Cir. 1983) (original design problem of entire system); Ontai v. Straub Clinic and Hospital, Inc., 66 Haw. 237, 659 P.2d 734 (1983) (product itself caused injury); Lundy v. Whiting Corp., 93 Ill. App. 3d 244, 417 N.E.2d 154 (1981) (original design problem of entire system); General Elec. Co. v. Schmal, 623 S.W.2d 482 (Tex. App. 1981) (original design problem of entire system); Atkins v. Blaw Knox Foundry and Mill Mach., Inc., 483 F. Supp. 1201 (W.D. Pa. 1980) (original design problem of entire system); Caterpillar Tractor Co. v. Gonzales, 599 S.W.2d 633 (Tex. App. 1980) (original design problem of entire system); Caterpillar Tractor

B. The Theory of Strict Liability Does Not Extend To A Service Contract or the Provision of Services.

It is the Court's prerogative to address and determine the legal and policy issues which underlie the application and claimed extension of the strict liability theory. See, e.g., Harris v. Northwest National Gas Co., 284 Or. 571, 588 P.2d 18 (1978); Phillips v. Kimwood Machinery Co., 269 Or. 485, 525 P.d 1033 (1974). The law of strict product liability is based on certain public policy considerations that have no relevance to this case. A survey of cases addressing the issue overwhelmingly

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Co. v. Beck, 593 P.2d 871 (Alaska 1979) (original design problem of entire system); Allen v. Heil Co., 285 Or. 109, 589 P.2d 1120 (1979) (original design problem of entire system); Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (original design problem of entire system); Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978) (original design problem of entire system); Brannon v. Southern Illinois Hospital Corp., 69 Ill. App. 3d 1, 386 N.E.2d 1126 (1978) (product itself caused injury); Brown v. North Am. Mfg. Co., 176 Mont. 98, 576 P.2d 711 (1978) (original design problem of entire system); Hornbeck v. Western States Fire Apparatus, Inc., 280 Or. 647, 572 P.2d 620 (1977) (original design problem of entire system); Foster v. Day & Zimmerman, Inc., 502 F.2d 867 (8th Cir. 1974) (part itself caused injury); Luque v. McLain, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972) (original design problem of entire system); Bexiga v. Havir Mfg. Corp. 60 N.J. 402, 290 A.2d 281 (1972) (original design problem of entire system); Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971) (product itself caused injury); Carpenter v. Best's Apparel, Inc., 4 Wash. App. 439, 481 P.2d 924 (1971) (identical to Gimbel's); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) (original design problem of entire system); Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) (original design problem of entire system); Haley v. Merit Chevrolet, Inc., 67 Ill. App. 2d 19, 214 N.E.2d 347 (1966) (part itself caused injury).

shows that the underlying policy to Section 402A does not apply to a situation where one performs a customized service contract.[7]

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[7] In addition to the cases cited in text, the following cases hold that a provider of services, such as Tel Tech, is not subject to a claim of strict liability. See Kaplan v. C Lazy U Ranch, 615 F. Supp. 234 (D. Colo. 1985) (where plaintiff fell from horse she had leased, she had no problem identifying defendants as ones responsible for alleged act of negligence and strict liability claim was barred); Barry v. Stevens Equip. Co., 176 Ga. App. 27, 335 S.E.2d 129 (1985) (where employer had asked defendant to completely rebuild machine but had not asked for safety devices, contract was for services and defendant was not subject to claim of strict liability); Industrial Risk Insurers v. Creole Production Services, 746 F.2d 526 (9th Cir. 1984) (service of pipeline consulting not subject to strict product liability theory); Kodiak Electric Ass'n, Inc. v. Delaval Turbine, Inc., 694 P.2d 150 (Alaska 1984) (repairer and rebuilder of generator not subject to claim of strict products liability); Huang v. Garner, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1984) (designer and constructor of building not subject to doctrines of implied warranty and strict liability where primary objectives of the transaction are to obtain services); Siciliano v. Capital City Shows, Inc., 124 N.H. 719, 475 A.2d 19 (1984) (amusement park owner/operator held to standard of reasonable care and is not subject to strict liability); Winans v. Rockwell Intern. Corp., 705 F.2d 1449 (5th Cir. 1983) (a repairer of engine on jet that exploded in midair could not be held strictly liable for engine defects existing after it overhauled the engines; repairer provides services which are not covered under strict liability); Kohr v. Johns-Manville Corp., 534 F. Supp. 256 (E.D. Pa. 1982) (inspector of industrial plant could be held liable for negligence, but not for strict liability); Stafford v. International Harvester Co., 668 F.2d 142 (2nd Cir. 1981) (if transaction is predominantly service oriented with incidental transfer of parts and components, strict liability doctrine does not attach); Hall v. State, 106 Misc. 2d 860, 435 N.Y.S.2d 663 (1981) (provider of professional services not subject to suit on grounds of strict products liability; design and problems therewith are not a "product" but provision of professional services); Stuckey v. Young Expl. Co., 586 P.2d 726 (Okl. 1978) (a repairer is held to a negligence standard and does not fall within the theory of strict liability); Walla v. United States, 432 F. Supp. 618 (E.D. Wis. 1977) (United States government's planning and designing cow yard are services which are beyond the scope of strict liability doctrine); Costaldo v. Pittsburgh-Des Moines Steel Co., 376 A.2d 88 (Del. 1977) (designer and

In addition to the fact that a contract for services does not fall within the express coverage of Section 402A, as adopted by the Utah Supreme Court in Ernest W. Hahn, Inc., v. Armco Steel Co., 601 P.2d 152 (Utah 1979) or the Court's justification for its adoption, the reasons are myriad for the overwhelming refusal to extend Section 402A's parameters to service contracts.

First, a supplier or manufacturer of a defective product is in a qualitatively different position than someone such as Tel Tech that provides a specialized, custom service, because of its ability in mass production to develop standardized processes and quality control. (Mr. Conger himself recognized this and other policy issues which distinguish the service contract situation

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construction supervisor of chemical facility cannot be held liable in absence of negligence); Bolduc v. Herbert Schneider Corp., 117 N.H. 566, 374 A.2d 1187 (1977) (ski area operator is not manufacturer or seller of tramway but only provides a service, i.e., transportation up the mountain slope); Raritan Trucking Corp. v. Aero Commander, Inc., 458 F.2d 1106 (3rd Cir. 1972) (strict liability did not extend to a servicer of landing gear on airplane which crashed); Wagner v. Coronet Hotel, 10 Ariz. App. 296, 458 P.2d 390 (1969) (claim of strict liability by hotel patron who slipped on bath mat was properly dismissed); Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968) (optometrist who designed contact lenses for plaintiff's particular physical requirements and needs, developed contact lenses after the physical exam specifically for plaintiff, and whose specific lenses were not offered to the general public in regular channels of trade, was not subject to claim of strict liability); Pepsi Cola Bottling Co. v. Superior Burner Service Co., 427 P.2d 833 (Alaska 1967) (defendant who failed properly to repair boiler not subject to claim of strict liability); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (1967) (dentist who broke needle inside patient while injecting local anesthetic not subject to strict liability).

from one where Section 402A is properly applied. See Footnote 2, Prior Reply Brief of Appellant, p. 12.) In refusing to extend the theory of strict liability to an independent contractor who provided customized services, the court in Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1983)(en banc) stated:

> "Suppliers and manufacturers, who typically supply and produce components in large quantities, make standard goods and develop standard processes. They can thus maintain high quality control standards in the controlled environment of the factor[y]. On the other hand, the architect or contractor can pre-test and standardize construction designs and plans only in a limited fashion. In addition, the inspection, supervision and observation of construction by architects and contractors involves individual expertise not susceptible to the quality control standards of the factory."

Id. at 828 (quoting Burmaster v. Gravity Drainage Dist. No. 2 of St. Charles Parish, 366 So.2d 1381, 1386 (La. 1978)); see also Lemley v. J & B Tire Co., 426 F. Supp. 1378, 1380 (W.D. Pa. 1977) ("While the burden of proof to show negligence by a manufacturer is a difficult one where products are standardized and mass produced, the burden of showing negligence against a repairman, who must repair one car at a time, is easier. It was the social policy of protection of the consumer against the mass producer or distributor that induced the adoption of the strict liability doctrine. See Comment F to Sec. 402A. That policy is not applicable to the present factual situation of an individual repair and an isolated sale").

Indeed,

> "[t]he services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance."

Allied Properties v. John A. Bloom and Associates, Engineers, 25 Cal. App. 3d 848, 102 Cal. Rptr. 259, 264 (1972) (engineering services not covered by doctrine of strict liability) (quoting Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15, 21 (1954)).

A similar and related policy consideration for adoption of strict product liability was the consumer's difficulty to trace, pinpoint and prove fault up the distribution chain to a distant mass producer of goods. In dismissing plaintiff's claim of strict products liability in a contract for services, the court in Held v. 7-Eleven Food Store, 108 Misc. 2d 754, 438 N.Y.S.2d 976 (1981), stated:

> Further, the policy considerations responsible for the evolution of the doctrine of strict tort liability have no relevance to the facts of this case. As originally proposed strict products liability was to provide a means of recovery of damages for product-caused accidents against retailers and wholesalers in situations where the manufacturer was not amenable to the jurisdiction of the Court and the manufacturer's pockets were not deep enough. (See e.g., Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1099, 1114-24.) This consumer oriented policy also evolved to provide a means for injured parties to recover damages against manufacturers of defective products who were otherwise insulated from direct contact with the consumer or user by the wholesalers and retailers involved in the modern mass marketing chain. . . .
>
> Unlike the mass production of products for distribution to the consuming public, there exists no mass production of

> services which defendants' 7-Eleven store provides. These services are custom-tailored to meet the needs of the particular customers in the neighborhood. Consequently, there exists no body of distant consumers who are confronted with the difficult burden of tracing incompetent workmanship by the service provider. The transaction in this case emanated from the face to face relationship. Once plaintiff was injured as a result of faulty service, an action for negligence provides him with both an effective and reasonable remedy.

438 N.Y.S.2d at 978 (emphasis supplied); see also La Rasa v. Scientific Design Co., 402 F.2d 937, 942 (3rd Cir. 1968) ("Professional services do not ordinarily lend themselves to the doctrine of tort liability without fault because they lack the elements which gave rise to the doctrine. There is no mass production of goods or a large body of distant consumers whom it would be unfair to require to trace the article they used along the channels of trade to the original manufacturer and there to pinpoint an act of negligence remote from their knowledge and even from their ability to inquire. Thus, professional services form a marked contrast to consumer products cases and even in those jurisdictions which have adopted a rule of strict products liability a majority of decisions have declined to apply it to professional services"); Hoffman v. Simplot Aviation, Inc., 97 Idaho 32, 539 P.2d 584, 588 (1975) ("The rationale has been thoroughly explored . . . . It is sufficient to say that as contrasted with the sales of products, personal services do not involve mass production with the difficulty, if not inability, of the obtention of proof of negligence. The consumer in the personal service context usually

comes into direct contact with the one offering service and is aware or can determine what work was performed and who performed it"); K-Mart Corp. v. Midcon Realty Group of Conn., 489 F. Supp. 813, 819 (D. Conn. 1980) ("Indeed, the ability of K-Mart to isolate the architect as a possible source of negligence distinguishes this case from the typical strict tort liability cases involving defective products. An injured consumer's need to overcome the practical obstacles to identifying the possible wrongdoers in a mass production, mass distribution context is a rationale advanced in support of the strict liability doctrine. . . . In this context, it would be inappropriate to extend the doctrine of strict tort liability and dispense with the requirement that K-Mart plead and ultimately prove [the architect's] negligence").

Risk distribution was also a primary consideration in the development of strict liability doctrine. See Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944). Many courts have explained the inapplicability of risk distribution in a service contract setting. For example, in Held v. 7-Eleven Food Store, 108 Misc. 2d 754, 438 N.Y.S.2d 976 (1981), the court stated:

> [R]etailers or manufacturers are able to proportion their losses among the consuming public simply by increasing the cost of their products which is viewed as a minimal cost

> when compared to the loss suffered by the injured customer. . . .
>
> Moreover, risk distribution, which constitutes the fundamental underpinning for imposing strict tort liability on sellers in the distributive chain is an inappropriate policy consideration in a service oriented business. The service provider ultimately must absorb the financial liability or endeavor to spread the loss among a limited number of customers. This limited capability of risk distribution would jeopardize the continued vitality of service providers, like defendants.

438 N.Y.S.2d at 978. See also Stuart v. Crestview Mutual Water Co., 34 Cal. App. 3d 802, 110 Cal. Rptr. 543, 1 (1973) ("We cannot, however, find any basis for holding the engineers on a strict liability theory. They rendered a professional service and are in no sense analogous to manufacturers who placed products on the market and who are, therefore, in the best position to spread the cost of injuries resulting from defective products"); Allied Properties v. John A. Bloom & Associates, Engineers, 25 Cal. App. 3d 848, 102 Cal. Rptr. 259 (1972) (with respect to liability of a provider of services, "the well settled rule in California is that where the primary objective of a transaction is to obtain services, the doctrines of implied warranty and strict liability do not apply . . . . 'He was not a seller of property who obligated himself as part of his bargain to convey property in the condition represented. . . . Thus, the general rule is applicable and those who sell their services for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or

intentional misconduct'") (quoting Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15, 20 (1954)).

Two basic conclusions emerge from the above case analysis. First, Tel Tech is in the position of a provider of customized services. Second, under the facts of this case, Tel Tech is not subject to the doctrine of strict products liability. Because of its skill and expertise in heliarc welding, Tel Tech was hired to perform a customized service--weld two spray balls into the top of an existing trailer. Plaintiff has successfully argued to this Court that in such a contract for services, the installer has a duty of ordinary care. However, Tel Tech was not in a position analogous to a distant, mass producer or distributor that is subject to standardized quality control procedures in a controlled environment. Rather, Tel Tech's customized service involved individual expertise and design engineering not subject to factory controls.

Because plaintiff's claim is with the manner of installation rather than the spray balls themselves, the defective product problem of pinpointing, tracing and proving a remote act of negligence does not exist. Plaintiff's problem of proof of fault does not extend up the distribution chain, where the sale of defective, injury-causing spray balls would. In this personal service context, Mr. Conger himself came into direct contact with Tel Tech. He was intimately aware of what work was performed and

who performed it. Where plaintiff was allegedly injured due to faulty service, an action for negligence provided him with both an effective and reasonable remedy.

Tel Tech was not in an analogous position to manufacturers who place products on the market, who are in the best position to spread the cost of injuries resulting from defective products, and who proportion their losses among the consuming public by increasing costs of injurious products. Tel Tech's welding service was specialized, generally limited to the dairy industry and those in need of stainless steel welding, and simply charged for labor and parts. As a policy consideration, spreading such losses among such limited customers would jeopardize the vitality of Tel Tech or other similarly situated service providers. Also, because Mr. Conger's contention goes to the manner of installation rather than the spray balls, Tel Tech could not look to the marketing chain for risk distribution.

POINT II

THE TRIAL COURT'S JURY ADMONITION TO DISREGARD ONLY TESTIMONY GOING SOLELY TO THE STRICT LIABILITY CLAIM CORRECTLY INFORMED THE JURY OF THE DIFFERENCE IN LEGAL CONCEPTS IN AVOIDING CONFUSION AND PREJUDICE.

Mr. Conger contends that the trial court's admonition to the jury to disregard testimony that focused on the strict liability theory created confusion and misunderstanding and therefore prejudiced Mr. Conger's negligence claim. Plaintiff's contention is without merit.

First, trial judges frequently grant motions for directed verdict as to some, but not all, claims, and commonly instruct juries on the consequences of the elimination of a claim and the need to disregard certain evidence going solely to that claim.

Second, the claimed interrelatedness between Mr. Conger's claim of negligence and his claim of strict liability is a ruse. Plaintiff's expert testified extensively regarding the standard of reasonable care in the industry and Tel Tech's fault in respect thereto. Then, the focus of the testimony changed and, over objection, Mr. Eilers testified regarding the unreasonably dangerous condition of the "product" itself. As is shown by the distinction in Mr. Eilers' testimony, the case law draws the same obvious distinction between negligence (fault--look to the conduct of the alleged wrongdoer) and strict liability (no-fault --look to the condition of a product). See e.g., Brown v. Superior Court (Abbott Laboratories), 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988); Smith v. Home Light and Power Co., 734 P.2d 1051 (Colo. 1987); Davis v. Globe Mach. Mfg. Co., 102 Wash. 2d 68, 684 P.2d 692 (1984). The difference between the two theories is the focus of the trier of fact. The trial court's admonition correctly informed the jury of the differences in the legal theories, that they would be asked to determine the case on the fault theory only, and that the evidence going solely

to the alleged unreasonably dangerous condition of the product went to the theory that was dismissed and should be disregarded.

Third, the trial court immediately followed the admonition with extensive jury instructions defining the various terms that make up the negligence cause of action. Utah case law is clear that a jury verdict should not be upset where the instructions, considered together, give the jury a fair understanding of the issues of fact and law and that no particular instruction or part thereof should be picked out and considered separately. See Biswell v. Duncan, 742 P.2d 80 (Utah App. 1987); Bigler v. Mapleton Irr. Canal Co., 669 P.2d 434 (Utah 1983); Debry & Hilton Travel Services, Inc. v. Capitol Intern. Airways, Inc., 583 P.2d 1181 (Utah 1978); Ewell & Son, Inc. v. Salt Lake City Corp., 27 Utah 2d 188, 493 P.2d 1283 (1972). The jury admonition, considered separately or with the other instructions as a whole, fairly and accurately apprised the jury of the issues of fact and law they were to consider.

Finally, Mr. Conger's attorney argued the case to the jury relying heavily on the negligence jury instructions and definitions and on Mr. Eilers' testimony regarding standards in the industry, minimum standards of care and Tel Tech's alleged fault.

To leave the evidence before the jury without admonition would have prejudiced Tel Tech in light of the trial court's

correct ruling on Mr. Conger's strict liability claim. The trial court's explanation to the jury was fair and accurate and did not prejudice Mr. Conger's negligence claim. If Mr. Conger felt that the instruction was inadequate or confusing in any way, he certainly could have offered what he felt to be an appropriate alternative.[8]

POINT III

IF THE CASE IS REMANDED FOR ANOTHER TRIAL ON NEGLIGENCE, TEL TECH IS ENTITLED TO ASSERT MR. CONGER'S COMPARATIVE NEGLIGENCE AS AN AFFIRMATIVE DEFENSE.

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[8] Even if the trial court's word choice, timing, or some similar aspect of the instruction were subject to question, such problems do not justify upsetting the jury's verdict. As the United States Supreme Court stated:

> This Court has long held that "'[a litigant] is entitled to a fair trial but not a perfect one, for there are no perfect trials." Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials. It seems doubtful that our judicial system would have the resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing case-load. Even this straightforward products liability suit extended over a three-week period.
>
> We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered "'citadels of technology.'" The harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for "error" and ignore errors that do not affect the essential fairness of the trial.

McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984) (quoting Brown v. United States, 411 U.S. 223, 231-32 (1973) and Kotteakos v. United States, 328 U.S. 750, 759 (1946)).

Mr. Conger contends that if the case is remanded for another trial on negligence, Tel Tech may not assert as an affirmative defense Mr. Conger's comparative negligence. To get to his argument for a new trial, however, Mr. Conger claims jury confusion and misunderstanding as a result of the court's admonition to disregard certain evidence, particularly part of Mr. Eilers' testimony. Tel Tech denies any jury confusion or misunderstanding or prejudice to Mr. Conger's negligence claim. However, if this Court found jury confusion or misunderstanding, it is difficult to see how such confusion or misunderstanding could be fairly characterized as going to only one aspect of the case. Indeed, during cross-examination Mr. Eilers testified extensively regarding errors and omissions of Mr. Conger, evidence which directly supports defendant's affirmative defense. Surely, if the jury were confused about the extent to which it should rely on Mr. Eilers' testimony, defendant's case would have been equally prejudiced. However, no prejudice to plaintiff's claim occurred.

In addition, the jury was instructed to address Mr. Conger's comparative fault and defendant's affirmative defense only if it found Tel Tech negligent and such negligence the proximate cause. The jury found that Tel Tech was not negligent, and therefore, it was required not to address Tel Tech's affirmative defense.

Therefore, the jury's finding on Mr. Conger's fault was in disregard of the instructions, went beyond their charge, and is unreliable.

CONCLUSION

The extensive factual and legal history of this case shows that Mr. Conger has had his day in court with fair, accurate and appropriate dispensation of justice and of legal standards. For this reason, Tel Tech respectfully requests this Court's Order affirming the Entry of Judgment on the jury verdict.

DATED this 1st day of September, 1989.

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CERTIFICATE OF SERVICE

This is to certify that on the 1st day of September, 1989, four true and correct copies of the foregoing BRIEF OF RESPONDENT were mailed, first class, postage prepaid, to the following:

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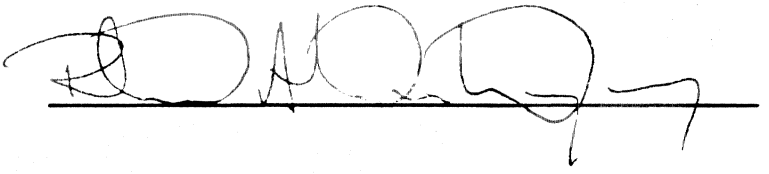

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